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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1933.

MANHATTAN PROPERTIES, INC., *Petitioner,* *vs.* IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.	No. 505
SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners,* *vs.* IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.	No. 506

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the United States Circuit Court of Appeals are reported in 66 Fed. (2d) 470, 473.

STATUTES INVOLVED

Section 63 of the Bankruptcy Act provides:

"*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

"'debt' shall include any debt, demand or claim provable in bankruptcy;"

Section 17 provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts". * * * with exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C. A., Title 11, Sections 1, 35 and 103.)

STATEMENT

No. 506. Brown v. *Irving Trust Company.*

On August 29, 1932, United Cigar Stores Company of America, a New Jersey corporation, was adjudicated a bankrupt upon its voluntary petition in the Southern District of New York (R. 1). On June 14, 1920, certain premises located in Nebraska were leased to United Cigar Stores Company of America at a stated rental for a term of years commencing July 1, 1920, and expiring June 30, 1945 (R. 2). The petitioners, Samuel R. Brown, Almira B. Millard, Alfred Millard and Hugh Millard, are now owners of these premises subject to the lease (R. 2). The lease contained the following covenant (R. 7):

> "Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and

remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On November 23, 1932, Irving Trust Company, Trustee in Bankruptcy, disaffirmed the lease (R. 21). Thereafter, on November 26, 1932, the petitioners re-entered upon the premises and terminated the lease (R. 21). The petitioners filed a proof of claim on January 13, 1933, which, as amended (R. 19), included an item of $4,404.40, representing the difference between the rent accrued to the date of re-entry and the collections from occupants of the premises during that period, and an item of $140,615.80 (R. 21), representing the loss alleged to have been suffered by reason of such termination for the residue of the term, computed as follows: The rent reserved in the lease was $20,000 per annum after taxes and charges. The petitioners alleged the property had a rental value for the residue of the term of $5,000 a year after taxes and charges, and claimed that their loss was $15,000 per annum from November 26, 1932 to June 30, 1945, the present value of which, discounted at 5% annually, they assert to be $140,615.80 (R. 21). On February 28, 1933, the petitioners made application for liquidation of this claim

under Section 63b of the Bankruptcy Act (R. 16). On March 8, 1933, the Trustee obtained an order to show cause why the claim should not be disallowed and the proof thereof expunged (R. 18). The Referee disallowed both items of the claim, holding that as a matter of law they were not provable, and expunged the proof thereof (R. 23-30). On petition for review, the order of the Referee was affirmed by the District Court (R. 33), and, on appeal, the judgment below was affirmed by the United States Circuit Court of Appeals.

No. 505. Manhattan Properties, Inc. v. *Irving Trust Company.*

Oliver A. Olson Co., Inc. was adjudicated a bankrupt in the Southern District of New York on March 18, 1932. On December 20, 1927, one Reid, then owner of certain real estate in New York City, leased such property to the Oliver A. Olson Co., Inc. at a stated rental for a term commencing February 1, 1928, and expiring October 1, 1937 (R. 3). In December, 1928, the property was conveyed to Manhattan Properties, Inc. subject to the lease.

Oliver A. Olson Co., Inc. defaulted in the payment of rent for February and March, 1932. Upon its adjudication in bankruptcy, Manhattan Properties, Inc. filed its claim, comprising one item of $1,558.93 (representing rent for February and March less $107.75 received from the Receiver for use and occupation), and another item for $25,000 damages for loss of future rentals, being the difference between the total unaccrued rent for the balance of the term reserved in the lease, viz., $58,000 and $33,000 which Manhattan Properties, Inc., alleged

to be the present rental value of the remainder of the term (R. 2). The lease (R. 3) provided (R. 13):

> PROVIDED ALWAYS NEVERTHELESS, that if default be made by the Tenant in the performance of any covenant herein, except the covenant for the payment of rent or additional rent, or in the covenants of any other lease between the Landlord and Tenant, the Landlord, upon the happening of any such events, may give to the Tenant five days' notice of intention to end the term of this lease or any other lease between the Landlord and Tenant, and thereupon, at the expiration of said five days, the term of this lease and any and all other leases affecting the same Landlord and Tenant shall expire as fully and completely as if that day were the date herein or therein definitely fixed for the expiration of the term, and the Tenant will then quit and surrender to the Landlord the demised premises mentioned in this or any such lease; but the Tenant shall remain liable as herein provided, except that if the demised premises be destroyed by fire or other casualty the foregoing provision shall not affect any other lease between the same Landlord and Tenant; or, if the Tenant make default in the payment of the rent reserved hereunder, or any part thereof, or in making any other payment herein provided for, or if the notice last above provided for shall have been given and said five days' period shall have elapsed, or if the Tenant abandon said premises, if said premises become vacant, if the Tenant become insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant, if a Receiver or Trustee of the Tenant's property be appointed, or if any similar event happen in re-

spect to any other lease between the Landlord and the Tenant, then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises and every part thereof, either by ejectment, summary proceedings, personal entry, or otherwise, and remove all persons and property therefrom without being liable to indictment, prosecution, or damages therefor, and in the event of such re-entry or the cessation or cancellation of such estate, lease, renewal or extension, the Tenant, for the Tenant and for all persons claiming through or under the Tenant, hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part of the term herein demised, from time to time, as the Landlord may deem best. In the event that the Landlord shall obtain possesion by re-entry, dispossess, summary proceedings or otherwise, the Tenant hereby agrees to pay to the Landlord on demand the expense incurred by the Landlord in obtaining possession of said premises, including legal expenses and attorneys' fees, and to pay such other expenses as the Landlord may incur in putting the premises in good order and condition, and also any other expense or commissions which may be paid by the Landlord in and about the letting of the same. The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord;

> the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder. The Landlord may sue for and enforce the collection by law of such amount as above provided for which may be due at the expiration of each month, and the Tenant expressly agrees that any such suit shall not be a bar to or prejudice in any way the rights of the Landlord to enforce the collection of the amount due at the end of any other future month by a like or similar proceeding. If said Tenant shall, at the date of the execution of this lease, be in possession of said premises under an existing lease, it is agreed that if the said lease under which said Tenant holds said premises shall for any cause be cancelled before its date of expiration, then this lease shall likewise, at the option of the Landlord, be void and of no effect.

The claim insofar as it related to rent accrued to the date of bankruptcy was allowed. Insofar as it related to damages for loss of future rentals, it was disallowed by the Referee in Bankruptcy (R. 17), on the ground that, as a matter of law, it did not constitute a provable claim in bankruptcy (R. 20). On petition to review, the United States District Court affirmed the order of the Referee (R. 21). The order of the District Court was affirmed on appeal to the United States Circuit Court of Appeals (R. 25).

SUMMARY OF ARGUMENT.

I.

(A) The Legislative and Judicial history of the Bankruptcy Act is persuasive, if not conclusive, that Congress did not intend that claims for damages for loss of future rent should be provable in bankruptcy.

(B) Moreover, only compelling language in the Act itself—which is wanting therefrom—would warrant the rejection of the construction placed upon the Act by the courts below, which is a construction accepted and followed with substantial unanimity by Bench and Bar practically ever since the enactment of the statute.

(1) The Legislative and Judicial background of the present Bankruptcy Act.

(2) The interpretation placed upon the Act since its passage and the subsequent action of Congress, down to the year 1933.

(3) Decisions of this Court and subsequent legislative history of the Act up to March, 1933.

(4) The foregoing review of the legislative and judicial history of Section 63a conclusively demonstrates that the long accepted interpretation thereof by Bench and Bar coincides with the intent of Congress itself.

(5) The amendment of March 3, 1933 was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

(6) In view of the legislative and judicial history of the Act, the Court should affirm, because there is lacking in the statute itself that com-

pelling language which alone would warrant the Court in overturning an interpretation of the Act followed and accepted by Bench and Bar practically ever since its enactment.

(a) There is no compelling language in the statute requiring the overturning of the long established interpretation.

(b) As in *Maynard* v. *Elliott,* to overturn the settled practice of more than thirty years would involve serious consequences.

II.

The long accepted interpretation of the Act upon which the decisions below are based is consistent with the decisions of this Court and is supported by well established and long recognized principles of law (Answer to Points I, III, IV, V, VI of Petitioners' Brief).

III.

The specific claims presented in these cases, arising out of the particular covenants contained in the leases before the Court, are in no event provable in bankruptcy.

(1) In the *Brown* case, No. 506.

(2) In the *Manhattan Properties* case, No. 505.

(3) Even though a claim for damages under breach of a simple covenant to pay rent should be held to be provable, claims arising under the leases here in question are not provable.

ARGUMENT

I

(A) THE LEGISLATIVE AND JUDICIAL HISTORY OF THE BANKRUPTCY ACT IS PERSUASIVE, IF NOT CONCLUSIVE, THAT CONGRESS DID NOT INTEND THAT CLAIMS FOR DAMAGES FOR LOSS OF FUTURE RENT SHOULD BE PROVABLE IN BANKRUPTCY.

(B) MOREOVER, ONLY COMPELLING LANGUAGE IN THE ACT ITSELF—WHICH IS WANTING THEREFROM—WOULD WARRANT THE REJECTION OF THE CONSTRUCTION PLACED UPON THE ACT BY THE COURTS BELOW, WHICH IS A CONSTRUCTION ACCEPTED AND FOLLOWED WITH SUBSTANTIAL UNANIMITY BY BENCH AND BAR PRACTICALLY EVER SINCE THE ENACTMENT OF THE STATUTE.

Under Point II we shall endeavor to show that, contrary to the contentions of the petitioners, the construction placed upon the Act by the courts below is not inconsistent with the decisions of this Court, but is, in fact, sustained by well established principles of law recognized by this Court.

At the outset of the argument, however, it will be helpful to review briefly the legislative and judicial history of the Bankruptcy Act relating to future rent claims. Such history is a helpful guide to interpretation in any case, and particularly so in this instance. In this, as in many other cases, legislative and judicial history

are so interwoven that they may appropriately be considered together.

1. The Legislative and Judicial background of the present Bankruptcy Act.

Under the Bankruptcy Act of 1800, claims for future rent were not provable and the bankrupt's discharge did not relieve him from liability under a lease. *Hendricks* v. *Judah*, 2 Caines 25 (N. Y., 1804). The same doctrine was applied under state insolvency laws on the theory that rent to accrue was not a present debt, the court following the rule then being applied by the British courts under the British Bankruptcy Act (7 Geo. I., c. 31). *Lansing* v. *Prendergast*, 9 Johns. 127 (N. Y., 1812).

The Bankruptcy Act of 1841 made express provision for proof and allowance of "uncertain or contingent demands" against a bankrupt, although claims for future rent were not specifically mentioned.*. Notwithstanding the express provision for proof of uncertain and contingent demands and for the determination of their present value, this Court held that claims based upon contracts, in respect of which it was uncertain whether

*The Bankruptcy Act of 1841, Sec. 5, provided in respect of claims for unmatured obligations:

> "* * * all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts in presenti * * *."

any actual liability would ever arise and if so to what extent, and such uncertainty could not be removed by calculation, were not provable. *Riggin* v. *Maguire,* 15 Wall. 549 (1872). In the state courts, it was specifically held that claims for future rent were not provable under that Act and hence not discharged, the courts refusing to assimilate claims for future rent to the various classes of claims mentioned in the Act of 1841, as being neither a present debt nor a contingent claim susceptible of present valuation. *Bosler* v. *Kuhn,* 8 Watts & S. 183 (Pa., 1844), *Stinemets* v. *Ainslie,* 4 Denio 573 (N. Y., 1847), *Savory* v. *Stocking,* 4 Cush. 607 (Mass., 1849).

The Bankruptcy Act of 1867, Sec. 19, provided:

> "* * * In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such a manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.
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> "* * * Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Under this Act, the courts continued to hold that claims for future rent or damages for breach of lease were not provable. Some of the cases so holding relied upon the provision permitting proof for a proportionate part of the rent up to the date of bankruptcy, holding that this impliedly prohibited proof of any rent accruing thereafter, particularly in view of the further provision in the Act that only specified debts should be proved. *In re May*, Fed. Cas. 9325 (D. C. S. D. N. Y., 1874); *In re Hufnagel*, Fed. Cas. 6837 (D. C. E. D. Mich., 1875); *Bailey* v. *Loeb*, Fed. Cas. 739 (C. C. M. D. Ala., 1875).

Others, *Ex parte Houghton*, Fed. Cas. 6725 (D. C. Mass., 1871) and *Ex parte Lake*, Fed. Cas. 7991 (D. C. Mass., 1877), disallowed such claims upon the common law principle that rent was not a debt until the rent day and did not fall within the provisions of the Act permitting proof of contingent claims. See also *In re Croney*, Fed. Cas. 3411 (D. C. S. D. N. Y., 1875); *In re Commercial Bulletin Co.*, Fed. Cas. 3060 (C. C. La., 1876). In *Ex parte Houghton, supra,* the leading case arising under this Act, the court also pointed out that at common law re-entry by the landlord terminated the lease and discharged all obligations thereunder and that damages were not thereafter recoverable for a breach of the covenant to pay rent. It was pointed out that the question whether future rent can be proved as a debt in bankruptcy must depend upon the particular language of the statute, and that the law in this respect had been changed by statute in England but not by the Federal Bankruptcy Act.

As stated in petitioner's brief (p. 46), claims for loss of future rent were not provable under the British Bank-

ruptcy Acts until expressly made so by Section 23 of the Act of 1869 (32 & 33 Vict., c. 71), which provided as follows:

"23. When any property of the bankrupt acquired by the Trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bank-

rupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

This section was incorporated and amplified in Section 55 of the British Bankruptcy Act of 1883 (46 & 47 Vict., c. 52, s. 55), set forth *in haec verba* in petitioners' brief, pages 47-52, which Act was in effect at the time the Bankruptcy Act of 1898 was passed.

No corresponding change was made in our Bankruptcy Act of 1867 although it remained in effect for eleven years and until repealed in 1878.

In 1880, Judge Lowell, then United States Circuit Judge for the First Circuit, at the request of the Board of Trade of Boston and other mercantile associations, drafted a new Bankruptcy Act which, after revision by the National Convention of the Boards of Trade and other commercial organizations held in Washington on January 19 and 20, 1881, and after amendment and modification by the Judiciary Committee of the United States Senate, was introduced in Congress (Vol. XIV Congressional Record, pp. 42-49, 399; U. S. Sen. Ed. of Lowell Bill—1883) but failed of passage. This bill contained provisions similar in effect to those of the British Act of 1869 above referred to. Sec. 60 provided specifically for proof and allowance of all damages suffered by reason of the rejection by the trustee of a lease. Sec. 61 provided that the landlord or any creditor might in writing require the trustee to elect within twenty days after such notice whether to accept or decline a lease; that failure to accept within such time should be deemed a declination, in the event of which

"the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy."*

*Section 60 and 61 of Judge Lowell's bill were as follows:

"Debts.

"Sec. 60. That the following debts and liabilities and no others, shall be provable in bankruptcy: All debts absolutely due by the bankrupt at the commencement of the proceedings, whether then payable or not, with any interest which would have been recoverable thereon at that date, or with a rebate of interest upon such as were not then payable, and do not bear interest by the terms of the contract; all damages suffered by reason of the rejection by the trustee of a lease, as hereinafter provided; all demands for or on account of any goods or chattels wrongly taken, converted or withheld by the bankrupt, to the amount of their value, with interest; all unliquidated damages arising out of any contract or promise, absolute or contingent, express or implied, whether the breach is before or after the bankruptcy, the amount of all such demands and damages, and of all equitable debts, to be assessed in such mode as the court shall direct; all taxable costs incurred in good faith by a creditor before the bankruptcy, in an action to recover a provable debt, may be added to the proof thereof; all costs then taxable against a plaintiff who shall become bankrupt upon a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice. If judgment is obtained upon a provable debt pending the proceedings, and before the bankrupt's discharge, the debt and costs to the time of bankruptcy may be proved, as if no judgment had been obtained. If the bankrupt shall be bound as drawer, endorser, surety, bail or guarantor upon any bill, note, bond, specialty or contract, or for the debt of another, the creditor may prove the same at any time after the liability shall become fixed, and before the final dividend shall be declared. In all cases of contingent debts, demands and liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may apply to the court, seasonably before such final order, to have the value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall direct; and he

The Report of the Committee on the Judiciary of the House of Representatives (House Rept. No. 1228, 54th Cong., 1st Session), submitting and recommending the bill which subsequently became the present Act, does not disclose the origin of the phraseology contained in Sec. 63a. Neither does it discuss the classes of debts or claims intended to be included therein or excluded therefrom. See also House Rept. No. 65, 55th Cong., 2nd Session, p. 21; Senate Doc. No. 294, 55th Cong., 2nd Session, p. 22; *Schall* v. *Camors*, 251 U. S. 239, 250-251. In reporting this bill, the Committee was fully cognizant of prior acts and of the decisions thereunder, and of Judge Lowell's bill (which is referred to in the report), and must have been familiar with the

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may prove for the amount so ascertained. If the court shall find such debt or liability incapable of valuation, a decree to that effect shall be entered upon the record.

"Debts falling due at stated periods shall be apportioned up to the time of bankruptcy, and proof be made for the proportionate part thereof.

"Leases, Rents.

"Sec. 61. That the bankrupt shall not be entitled to the benefits, nor be bound by the covenants or engagements of any lease held by him at the time of his bankruptcy, but such lease shall be deemed to be surrendered, so far as he is personally concerned. The trustee may decline the lease at any time, notwithstanding that he may have endeavored to sell the same, or have exercised acts of ownership in respect thereto: *Provided*, That the landlord or any creditor may, in writing, require him to elect, within twenty days after such notice, whether to accept or decline the same; and the failure to accept within such time shall be deemed a declination. When a lease is declined, the landlord may have any damages he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy. Such declination shall not affect any right of the trustee to deal with fixtures belonging to the bankrupt."

British Bankruptcy Act. Moreover, the Committee Report discloses that both the subject and the text of a new bankruptcy act had been a matter of public debate by various disinterested organizations for a period of several years and that three national conventions had convened to discuss and perfect the bill which was reported, in the course of which consideration must have been given to prior acts and the decisions thereunder, to Judge Lowell's bill and to the British Act.

The Act as introduced and passed, however, made no specific provision for proof and allowance of claims for damages for loss of rent, which had been held not to be provable under previously existing acts, both American and British, and to meet which Judge Lowell's bill and the then existing British Act made specific provision. The omission must have been by design. The inference is plain that by such omission Congress intended that claims for damages for loss of rent should remain, as before, unprovable under the Act. *Schall* v. *Camors, supra.*

2. The interpretation placed upon the Act since its passage and the subsequent action of Congress, down to the year 1933.

Whether or not Congress intended by such omission that such claims should be unprovable, it was apprised by the courts almost immediately after the Act became effective that in their opinion such claims were not provable. Within two years after the passage of the Act it was held in *In re Ells,* 98 Fed. 967 (D. C. Mass.,

1900), that neither claims for damages for loss of rent nor claims arising under a contract of indemnity, similar to the contracts in these cases, were provable in bankruptcy. The rule therein stated has been subsequently followed by the Circuit Courts of Appeals for the First, Second, Fifth, Sixth, Eighth and Ninth Circuits (as impliedly conceded in petitioners' brief) and by the District Courts generally. These cases, cited in the order of their determination, are as follows: *In re Ells, supra; In re Collignon,* 4 A. B. R. 250 (D. C. N. D. N. Y., 1900); *Atkins* v. *Wilcox,* 105 Fed. 595 (C. C. A. 5th, 1900); *In re Mahler,* 105 Fed. 428 (D. C. E. D. Mich., 1900); *In re Pennewell,* 119 Fed. 139 (C. C. A. 6th, 1902); *In re Shaffer,* 124 Fed. 111 (D. C. Mass., 1903); *Watson* v. *Merrill,* 136 Fed. 359 (C. C. A. 8th, 1905); *In re Roth & Appel,* 181 Fed. 667 (C. C. A. 2d, 1910); *Slocum* v. *Soliday,* 183 Fed. 410 (C. C. A. 1st, 1910); *In re Cress-McCormick Co.,* 25 A. B. R. 464 (D. C. S. D. Miss., 1910); *In re Sterne & Levi,* 26 A. B. R. 535 (D. C. E. D. Tex., 1911); *Colman Co.* v. *Withoft,* 195 Fed. 250 (C. C. A. 9th, 1912); *In re Sterne & Levi,* 30 A. B. R. 915 (D. C. E. D. Tex., 1912); *In re Abrams,* 200 Fed. 1005 (D. C. N. D. Ia., 1913); *In re Scruggs,* 205 Fed. 673 (D. C. S. D. Ala., 1913); *In re J. Sapinsky & Sons,* 206 Fed. 523 (D. C. Ky., 1913); *In re Frischknecht,* 223 Fed. 417 (C. C. A. 2d, 1915); *In re Mullings Clothing Co.,* 238 Fed. 58 (C. C. A. 2d, 1916); *McDonnell* v. *Woods,* 298 Fed. 434 (C. C. A. 1st, 1924); *In re Cushman,* 3 Fed. (2d) 449 (D. C. S. D. N. Y., 1924); *In re S. & H. Katz,* 6 Fed. (2d) 581 (D. C. N. D. Miss., 1925); *Britton* v. *Western Iowa Co.,* 9 Fed. (2d)

488 (C. C. A. 8th, 1925); *Wells* v. *21st St. Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926); *In re Mlle. Lemaud, Inc.*, 13 Fed. (2d) 208 (D. C. Mass., 1926), aff'd 16 Fed. (2d) 780; *In re Hook*, 25 Fed. (2d) 498 (D. C. Md., 1928); *In re Barton Co.*, 34 Fed. (2d) 517 (D. C. N. H., 1929) *In re Service Appliance Co., Inc.*, 39 Fed. (2d) 632, 45 Fed. (2d) 884 (D. C. N. D. N. Y., 1930); *In re Twentieth Century Millinery Exchange, Inc.*, 41 Fed. (2d) 237 (D. C. S. D. N. Y., 1930); *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930); *In re Goldberg*, 52 Fed. (2d) 156 (D. C. S. D. N. Y., 1931); *Trust Co. of Georgia* v. *Whitehall Holding Co.*, 53 Fed. (2d) 635 (C. C. A. 5th, 1931); *In re Blum Bros. Co.*, 55 Fed. (2d) 723 (D. C. S. D. Ohio, 1932); *In re Hubbard*, 57 Fed. (2d) 213 (D. C. W. D. N. Y., 1932); *In re Schulte-United, Inc.*, 2 Fed. Supp. 285 (D. C. S. D. N. Y., 1932); *In re Bliss Auto Sales Co.*, 22 A. B. R. (N. S.) 44 (D. C. N. D. Ohio, 1932); *In re Wise Shoes, Inc.*, 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. (2d) 1023; *In re Marshall's Garage, Inc.*, 63 Fed. (2d) 759 (C. C. A. 2d, 1933); *In re Metropolitan Chain Stores, Inc.*, 66 Fed. (2d) 482 (C. C. A. 2d, 1933); *In re United Cigar Stores Company of America*, 4 Fed. Supp. 859 (D. C. S. D. N. Y., 1933); *In re Brooks Sample Furniture Co.*, 4 Fed. Supp. 858 (D. C. Conn., 1933); *Orr* v. *Neilly*, 67 Fed. (2d) 423 (C. C. A. 5th, 1933).

We have found no decisions on the point by the Circuit Courts of Appeals of the Fourth or Tenth Circuits. In the only cases which have arisen

in the District Courts of the Fourth Circuit, however, rent claims have been held not to be provable. *Bray* v. *Cobb*, 100 Fed. 270, (D. C. N. C., 1900); *In re Hook*, *supra*. So far as the Tenth Circuit is concerned it may be safely assumed that the rule, which, as appears from the foregoing citations, is so well established in the Eighth Circuit beginning with *Watson* v. *Merrill*, *supra*, in which the opinion was written by Judge Sanborn and concurred in by Judge (now Mr. Justice) Van Devanter, is still the law in the Tenth Circuit.

The statement in petitioner's brief (p. 16) that "decisions in other Circuits show confusion and conflict" is inaccurate.*

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*Cases in the Third Circuit disclose the application in that Circuit of a somewhat different rule but one which is not in conflict. These cases are chiefly Pennsylvania cases, in which state there is a statute giving to the landlord a statutory lien for accrued rent. In cases in that Circuit where the lease contains an acceleration clause, under which all rent for the remainder of the term becomes immediately due and payable upon bankruptcy, it has been held that the effect of this clause is to accrue such rent as of the date of bankruptcy and entitle the landlord to the benefit of the statutory lien. *In re Pittsburgh Drug Co.*, 164 Fed. 482 (D. C. W. D. Pa., 1908): *In re Keith-Gara Co.*, 203 Fed. 585 (D. C. E. D. Pa., 1913), aff'd 213 Fed. 450. On the other hand it is the settled law in that Circuit that if the landlord re-enters and terminates the lease he forfeits all right to future rent and all obligation to pay rent ceases therewith, and the landlord is not entitled either to rent or damages for the remainder of the term. *Wilson* v. *Pennsylvania Trust Co.*, 114 Fed. 742 (C. C. A. 3rd, 1902); *South Side Trust Co.* v. *Watson*, 200 Fed. 50 (C. C. A. 3rd, 1912); *In re Lasket Co., Inc.*, 251 Fed. 53 (C. C. A. 3d, 1918), cert. denied 248 U. S. 562; *Rosenblum* v. *Uber*, 256 Fed. 584 (C. C. A. 3d, 1919). The theory of the rule in the Third Circuit appears to be that under the acceleration clause the rent for the entire remainder of the term becomes due and payable at the date of bankruptcy and that in return for the allowance of the landlord's claim the lease for the full remainder of the term becomes an asset of the estate to be disposed of along with other assets, free from any charge for rent

The construction therein placed upon the Act, which is the construction placed upon it by the courts below, has been accepted by leading text writers and announced by them to be the law, 2 Collier on Bankruptcy (13th ed.) p. 1422; 2 Remington on Bankruptcy (3d ed.) § 789, 793, 795, a circumstance stressed by the Court in *Maynard* v. *Elliott,* 283 U. S. 273 (1931), at p. 276.

Between the decision in *In re Ells, supra,* in 1900, and March 3, 1933, when an amendment of the Act referred to in the petitioners' brief was made (see pp. 34-43, *post*), Congress has amended the Bankruptcy Act seven times, on February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932. 47 Stat. 1467. During the intervening thirty-three years, however, no amendment was made to Sec. 63 so as to change the situation created by the substantial unanimity of opinion on the part of Bench and Bar, as disclosed above. Congress could not have been unmindful of these decisions. On the contrary, it is pre-

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during the remainder of the term, but that if the landlord, instead of invoking the acceleration clause, re-enters and terminates the lease, he is not entitled either to future rent or to damages. Whether the first part of the rule as thus announced is correct or not—a question not presented in this case—the corollary which accompanies it is in complete harmony with the rule in other Circuits that neither claims for future rent as such nor under contracts of indemnity are provable in bankruptcy.

The cases in the Seventh Circuit are in some confusion, but in *In re National Credit Clothing Company,* 66 Fed. (2d) 371 (1933), the Circuit Court of Appeals for that Circuit specifically recognized the general rule, and in *In re Rubel,* 166 Fed. 131 (D. C. E. D. Wis., 1908), it was expressly held that a claim for future rent could not be proved, even though liquidated by lease provisions.

sumed to know the interpretation placed upon its statutes by the courts. *United States* v. *Farrar,* 281 U. S. 624, 634. The inference is plain, that the decisions of the courts coincided with the intent of Congress and that Congress did not intend that claims for loss of future rent, whether arising under the covenant to pay rent itself or under a covenant of indemnity, should be provable in bankruptcy. (See I, 4, pp. 29-34, *post,* for authorities.)

3. Decisions of this Court and subsequent legislative history of the Act up to March, 1933.

In *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916), one of the cases relied on by the petitioners, the Court held that damages growing out of an anticipatory breach of a contract for personal services, which the bankrupt was disenabled to perform by reason of bankruptcy, constituted a provable claim. In so doing, this Court itself pointed out the distinction between such a case and a claim for damages arising out of the relation of landlord and tenant. After citing a number of cases relating to claims growing out of contracts relating to personalty or to performance of personal services, the Court said (p. 590):

> "* * * besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ells,* 98 Fed. Rep. 967; *In re Pennewell,* 119 Fed. Rep. 139; *Watson* v. *Merrill,* 136 Fed. Rep. 359; *In re Roth & Appel,* 181 Fed. Rep. 667; *Colman Co.* v. *Withoft,* 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the 'diversity betweene duties which

touch the realty, and the meere personalty.' Co. Litt., 292, b, § 513."

Of the cases cited in the foregoing excerpt, *In re Ells* (to which reference has previously been made) and *In re Roth & Appel* involved claims arising out of contracts of indemnity similar to those involved in the present cases. *Watson* v. *Merrill* was a case in which damages for breach of a simple covenant to pay rent were sought to be proved as a claim in bankruptcy. *In re Pennewell* involved a claim for breach of covenant of quiet enjoyment against the estate of the bankrupt by his sublessee because of the latter's eviction by the head landlord. *Colman Co.* v. *Withoft* involved a claim founded upon a bankrupt-lessee's contract to reimburse his joint lessee for half the cost of procuring a cancelation of the lease.

In varying forms, each of the cases cited in the foregoing excerpt thus related to claims growing out of the relation of landlord and tenant and of the contractual agreements entered into between them. As to each of these cases, the court declared them to be distinguishable from *Central Trust Co.* v. *Chicago Auditorium Association* upon the authority of the quotation from Lord Coke, which recognizes a fundamental distinction in the law between the rights and obligations of parties to contracts relating to realty and those of parties to contracts concerning personalty or personal services. Counsel for the petitioners in their brief concede that the rule laid down by Lord Coke is an insurmountable obstacle to the sustaining of their position and invite this Court to reject and overrule it. It is not our purpose in this portion of

the brief to argue the distinction between the cases relied upon by the petitioners and the question at issue. The foregoing dictum—if it be dictum—is important in connection with this review of the legislative and judicial history of the statute as at least a quasi-approval of the decisions of the lower Federal courts that claims for damages for loss of rent, as distinguished from claims for damages growing out of an anticipatory breach of a contract relating to personalty or personal services, were not provable in bankruptcy.

In *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597 (1918), the Court allowed recovery of damages in an equity receivership, on a claim filed by the landlord under a clause whereby the tenant agreed to pay upon re-entry and termination for any default, or because of bankruptcy, the difference between the stipulated rental and the fair rental value at the date of entry. It may be observed in passing that no such provision is to be found in either of the leases in these cases, but as to such an obligation, the Court said (pp. 600-602):

> "The Circuit Court of Appeals seems to have considered also that the filing of the bill had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date. 230 Fed. Rep. 31. 144 C. C. A. 329.
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> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's

> hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741."

In the same volume, at the same term, and through the same justice, the Court, in *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918), held unprovable in equity a claim for damages for loss of rent through breach of covenant to pay the same. In so doing, the Court said:

> "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

In the same case, the Court cited *Central Trust Co.* v. *Chicago Auditorium Association, supra,* in support of the proposition that "in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee". By reference to Lord Coke's maxim and to the *Chicago Auditorium* case, the Court therefore not only gave full force to the former but interpreted the dictum in the latter as we have interpreted it, viz., as the recognition of a distinction between claims for the anticipatory

breach of a contract relating to personalty or to the performance of personal services and claims for breach of covenants in leases and other contracts involving the relation of landlord and tenant.

The excerpts quoted from *Central Trust Co.* v. *Chicago Auditorium Association, supra,* and *William Filene's Sons Co.* v. *Weed, supra,* may be dismissed as dicta, although, for reasons hereinafter given, we think they rise considerably higher in their authoritative effect. The decision in *Gardiner* v. *Butler, supra,* however, may not be so dismissed. It was the decision of the Court on the point at issue.

Moreover, dicta of this Court, particularly when taking the form of setting forth the distinctions between the case decided and other cases relied on to support a contrary view, are commonly and properly regarded by the lower courts and by the Bar as expressive of the views of this Court and, it may be assumed, are so regarded by Congress.

Eight Congresses assembled after the decision in the *Chicago Auditorium* case and seven after the decisions in the *Filene* and *Gardiner* cases, down to the beginning of 1933. During the same period, four amendments to the Bankruptcy Act were passed: on March 2, 1917; January 7, 1922; May 27, 1926; and February 11, 1932. If, as petitioners assert, the expressions of this Court, as well as the interpretation long since universally given to the Act, were at variance with the congressional intent, it is indeed strange that during this whole period no amendment of Section 63a was either enacted or introduced for the purpose of conforming the law to the intent of Congress.

In *Maynard* v. *Elliott*, 283 U. S. 273 (1931), likewise relied on by petitioners, this Court sustained the theretofore generally accepted view of the lower courts and the legal profession that the liability of a bankrupt-endorser of unmatured commercial paper was a provable claim, although contingent in nature, but was careful to point out that not all contingent claims were so provable, citing, as an illustration, *Atkins* v. *Wilcox*, 105 Fed. 595, which was a future rent case.

Since the enactment of the present Bankruptcy Act, there have therefore been four distinct expressions of opinion by this Court recognizing that claims for damages for loss of future rent, whether by reason of breach of the covenant to pay rent itself or of contracts of indemnity or for liquidated damages, were not provable in bankruptcy.

4. The foregoing review of the legislative and judicial history of Section 63a conclusively demonstrates that the long accepted interpretation thereof by Bench and Bar coincides with the intent of Congress itself.

To sum up the foregoing review of the legislative and judicial history of this section of the Act: Under prior acts, both in this country and in England, claims for damages for loss of future rent had been held to be unprovable in bankruptcy, even when the statute made express provision for proof and allowance of contingent claims. Prior to the passage of the present Act, a bill had been introduced in Congress making specific provision for the allowance of future rent claims, and the British act had

been so amended for the purpose of overcoming prior judicial decisions that they were not provable. Congress cannot be assumed to have been unmindful of the fact that, under previous decisions, in the absence of express provision in the statute, such claims were not provable, or unmindful of the express provisions made therefor in the Lowell bill and in the British act. It nevertheless made no express provision in Section 63a for their provability and allowance.

Thirty-three years ago and within two years after the passage of the Act, the rule theretofore applied both in this country and in England to statutes containing no such provisions was held to be applicable to the present Act. Such rule has been accepted and applied with substantial unanimity in a multitude of cases in the lower Federal courts ever since and has throughout this long period been accepted and followed by text writers and by the profession generally. This Court in four cases has expressed approval of the accepted rule, its first expressions having been uttered eighteen years ago. In all, since the enactment of the Act, down to the beginning of 1933, seven amendments were made to the Bankruptcy Act. In none of them has Section 63a been amended so as to change the accepted interpretation placed upon it, and at no time during such period has any amendment for that purpose been offered.

The foregoing circumstances are not only highly persuasive but conclusive that the long accepted interpretation of this section, followed by the courts below, corresponded to the intent of Congress itself and may not and should not now be overridden.

In enacting the Bankruptcy Act of 1898 without making specific provision for the provability of claims for damages for loss of future rent, notwithstanding the fact that such claims had been held to be unprovable in the absence of such specific provision in prior acts, both in this country and in England, Congress must have intended the omission of such provision to have the same effect.

In *Schall* v. *Camors,* 251 U. S. 239, this Court was called upon to decide whether tort claims were provable under the Bankruptcy Act of 1898 and held that as such claims had not been provable under earlier bankruptcy acts, the omission of Congress to provide for the provability of such claims in the Act of 1898 made it clear that tort claims were not provable under that Act. The Court said (pp. 250, 251):

> "Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto.* [Citing previous statutes and decisions.]
>
> "Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures pro-

posed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the 54th Congress. Having then failed of passage, it was submitted again in the Second Session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a Conference Report became law. It is significant that §63 defining 'Debts which may be Proved' remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print, the word 'interests' having been substituted for 'interest.' House Rep. No. 1228, 54th Cong., 1st sess., p. 39; House Rep. No. 65, 55th Cong., 2d sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause *b* fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. *Such claims might easily have been mentioned if intended to be included.* Upon every consideration, we are clear that claims based upon a mere tort are not provable." [Italics ours.]

In other words, the principle is the same as that involved in the rule that when Congress adopts or re-enacts a statute in substantially the same terms as a previous statute, it enacts with it the judicial interpretation which

has been placed upon such previous act. *The "Abbotsford"*, 98 U. S. 440, 444; *Kepner* v. *U. S.*, 195 U. S. 100, 124; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Land, Logging & Manufacturing Co.*, 168 U. S. 604, 608; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *Brewster* v. *Gage*, 280 U. S. 327, 337.

In effect, therefore, the omission of Congress to make future rent claims provable by express provision therefor in the statute is an expression of legislative intent that such claims should not be provable in bankruptcy. Whether this be so or not, certain it is that the silence of Congress in the face of long continued judicial construction of the statute must be considered as constituting an adoption of that construction by the legislative body. As stated in *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372:

> "Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government."

This Court has said that even if it were in doubt as to the meaning of an Act of Congress, it should hesitate to set aside the uniform construction over a long period of years by the lower Federal courts. *United States* v. *Ryan*, 284 U. S. 167, 174; see also *Maynard* v. *Elliott*, *supra*.

And the rule that the established construction of Federal statutes by administrative branches of the Govern-

ment will not be overruled by this Court, unless such construction is clearly violative of the express terms of the statute, on the ground that such established construction could not be disturbed without introducing "serious mischiefs", applies with even greater force to a long established construction of the Bankruptcy Act in the course of its *administration* by the lower Federal courts and referees in bankruptcy throughout the country. See *United States* v. *Bank of North Carolina,* 6 Pet. 29, 39; *Pease* v. *Peck,* 18 How. 595, 597; *Schell's Executors* v. *Fauche,* 138 U. S. 562, 572; *United States* v. *Alabama Great Southern R. R. Co.,* 142 U. S. 615, 621; *United States* v. *Jackson,* 280 U. S. 183, 193; *National Lead Co.* v. *United States,* 252 U. S. 140, 146.

The conclusion is unavoidable, therefore, that the judicial construction of Sec. 63a of the Bankruptcy Act, whereby claims for damages for breach of lease or loss of future rents are held not to be provable, has been tacitly adopted by Congress.

5. The amendment of March 3, 1933 was not, as asserted by petitioners, declaratory of the intent of the Act as originally passed.

By an act of March 3, 1933, Congress added a new Chapter Eighth to the Bankruptcy Act. 47 Stat. 1467. As stated in the petitioners' brief (p. 54), this chapter provided for bankruptcy proceedings for compositions and extensions in the case of individuals, and for extensions and reorganizations in the case of railroad corporations. Section 74(a) of the chapter added is as follows:

"74(a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by section 18(b) of this Act, accompanied in either case, unless further time is granted, by his schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor.' The term 'creditor' shall include for the purposes of an extension proposal under this

> section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. *A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act.*" [Italics ours.]

Counsel concede that the amendment was not retrospective in effect (brief, pp. 55-56) as to claims in respect of which, as here, the time for filing claims had expired. Petitioners assert, however, that the amendment was declaratory.

If so, Congress took a long time and adopted a strange method to declare its original intent.

The Act had been in effect for thirty-five years. For thirty-three years Section 63a had been interpreted as excluding claims for damages for loss of future rent in any form. Seventeen years prior to the supposed declaratory amendment, this Court had expressed the same view by way of dictum; and fifteen years prior to this amendment, had decided that claims for damages for loss of future rent were not enforcible even in equity. There is nothing in the Congressional Record which indicates that any member of Congress regarded the amendment as declaratory. Were it otherwise, long acquiescence upon the part of Congress in the settled interpretation given to the Act during all these years is in itself sufficient to negative the remotest suggestion that the amendment passed at this late date was intended even by Congress itself to be declaratory. That it was not so intended is further evidenced by the fact that the new language introduced was not introduced as an amendment to Section

63a, but as a part of an added chapter relating to an entirely different subject and in itself complete as related to that subject.

The purpose of the added chapter, as stated by petitioners' counsel, was to provide for bankruptcy proceedings relating to compositions and extensions in the case of individuals and for extensions and reorganizations in the case of railroad corporations. For this purpose it set up a scheme of administration quite at variance with that contained in the Act in respect of bankruptcies generally. The scheme so set up was self-contained and complete. It would be idle to suggest that Chapter Eighth as a whole was declaratory of the original purpose of Congress in view of the fact that it was so at variance therewith and introduced new machinery and created new privileges and rights.

Neither will it be seriously contended that Section 74(a) of the added chapter was, as a whole, declaratory of the original Act. It likewise was at variance therewith. By its very terms, the new definition of the word "debt" so as to include claims for future rent is limited to "the purposes of an extension proposal under this section" (Section 74a), and by the very terms of the Act, the new definition of the word "creditor" so as to include holders of claims for future rent is similarly limited.

For the purpose of sustaining their contention that this new Act is in any way declaratory of the intent of the original Act, counsel for the petitioners are driven to wrest the last sentence of Section 74a forcibly from that section and from its context and convert it into an amendment of the Act generally. For Congress so to have

amended Section 63a would have been a strange procedure indeed.

The cases in which an amendment to an existing act of Congress has been held to be declaratory of the original act instead of an amendment changing the law for the future are rare indeed. Petitioners have cited none in which such an amendment has been held to be declaratory where its effect is directly contrary to previous judicial interpretation of the same statute. Even in cases where no constitutional rights are violated, it is clear that courts will not give a retrospective effect to a declaratory law unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it, and even in such cases, as stated in *Salters* v. *Tobias*, 3 Paige 338 (N. Y., 1832) at p. 344,

> "Courts will treat such laws with all the respect which is due to them as an expression of the opinions of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

See also *Koshkonong* v. *Burton*, 104 U. S. 668, 678; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 439; *United States* v. *Stafoff*, 260 U. S. 477, 480; Black on Interpretation of Laws (2nd ed.) § 181.

As already pointed out (p. 33, *supra*), failure of Congress to amend a statute which has been interpreted over a course of years in a certain way in itself indicates that the judicial interpretation corresponded to the congressional intent. To give to the amendment of

1933 the effect of a declaratory statute would so fly in the face of this rule, in view of the history hereinbefore reviewed, as to impugn the intelligence of both Congress and the courts.

In none of the cases cited by petitioners had there been any prior judicial interpretation contrary to the amendments referred to, which were construed to be of a clarifying character and declaratory because in harmony with the interpretation placed upon the statute by the courts. In one of them, *Cope* v. *Cope,* 137 U. S. 682, the subsequent act was so phrased as to be held by the Court not to be declaratory that the original intent of the two acts were the same but as declaratory of a contrary intent in the prior act. Such, we think, is the interpretation to be placed upon the amendment of 1933, however restricted or general in its scope, when considered in the light of previous judicial history of the Act.

What constitutes a declaratory statute has never been clearly defined. The most familiar case of a declaratory statute, of course, is one declaratory of the common law, as to which the test is fairly simple. A mere amendment to an act itself, particularly where the language speaks *in futuro,* would according to ordinary interpretation constitute a change in the law for the future and be neither a retrospective enactment or a declaration of the meaning of the prior act, retrospective statutes not being favored. *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160, 162; *White* v. *United States,* 191 U. S. 545, 552; *Shwab* v. *Doyle,* 258 U. S. 529, 534.

In any event there must be some indicia within the language of the act that it was intended to be declara-

tory of the prior act itself rather than to change the law for the future. The most certain way of accomplishing this purpose would be the enactment of a statute which in its terms was declaratory of the meaning of the previous act. The 1933 amendment contained no such statutory declaration.

The question in this case turns upon the definition to be given to the word "debt" in the Act of 1898. If Congress had intended the amendment to have the effect urged by the petitioners, seemingly it would have at least been enacted in the form of a definition of the word "debt", *e.g.*, by providing that the word "debt" as used in the act or in Section 63(a) thereof "should be deemed to include claims for future rent". This it did not do. On the contrary, by preceding language in the same section in which it did undertake to define the word "debt" as used in the Act, its definition is confined so as to be limited to extension proposals made under the section itself, as hereinbefore pointed out. Moreover, the language relied on not only speaks *in futuro* but does not in terms refer to Section 63(a), which is the section enumerating classes of claims provable, but to Section 63b, which provides for the liquidation of unliquidated claims *when* provable. The added sentence may, as counsel assert, have been surplusage, but its obvious purpose was to provide that the claims for future rent, made provable for the limited purposes of the section by its preceding language, should be liquidated as other provable claims are liquidated under Section 63b.

If Congress had intended the last sentence of Section 74(a) to apply not only to extensions, but also to ordinary bankruptcy proceedings, the other references to

future rent contained in Section 74(a), as well as the provision in Section 77 making claims for future rent provable debts in a railroad reorganization, would have been unnecessary surplusage. It should also be noted that to make the last sentence of Section 74(a) (which Section is entitled "Compositions and Extensions") apply to the entire Bankruptcy Act, would be to violate the canons of construction laid down in United States Code, Title I, Section 24, (See Act of February 25, 1871, c. 71 §1, 16 Stat. 431) requiring that each section shall "be numbered, and shall contain, as nearly as may be, a single proposition of enactment." Petitioners on page 59 of their brief argue that the words "under this Act" as used in Section 74(a) immediately preceding the last sentence show that Congress was speaking of provable claims under the Bankrupcty Act. This argument distorts the natural meaning of the words. It is perfectly plain that Congress intended to make provable, for purposes of extensions, certain classes of claims, including claims for future rent, which were not provable under the Bankruptcy Act in ordinary bankruptcy proceedings.

That Congress did not intend that the last sentence of Section 74a should be applicable to ordinary bankruptcy proceedings, is also indicated by the provisions of Section 73 of the Act of March 3, 1933, providing

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings *for the relief of debtors, as provided in Sections 74, 75 and 77 of this Act.*" [Italics ours.]

and also by the provisions of Section 2 of the Act of March 3, 1933, providing

> "This Act shall take effect and be in force from and after the date of its approval, and shall apply as fully to *debtors, their stockholders and creditors,* * * *" [not bankrupts, their stockholders and creditors,]. [Italics ours.]

Following the enactment of the Act of March 3, 1933, the House of Representatives, during the ensuing special session of Congress, on June 5, 1933 passed H. R. 5884 (which is now pending in the Senate). This bill, among other things, contained a proposed amendment of Section 63a of the Bankruptcy Act to make claims for damages respecting executory contracts, "including future rents whether the bankrupt be an individual or a corporation", provable claims (and by implication excluded such claims in pending bankruptcies). It is evident that this amendment was intended not as a mere clarifying change in the text, as suggested by petitioners (brief, p. 64), but as a change in the existing law, as indicated in the Report of the House Committee on the Judiciary (House Rept. No. 194, 73rd Cong., 1st Session) and that the Act of March 3, 1933, was not regarded as having declared that claims for damages for loss of future rent constitute provable claims in ordinary bankruptcy proceedings.

In short, to give to the last sentence of Section 74(a) the effect of an act declaratory of the intent of a prior Congress sitting 35 years ago is to disregard the context as well as to disregard the rules generally applicable in respect of amendments made to change a long established interpretation of the statute amended.

Moreover, if intended to be declaratory, the declaration is not binding upon the courts, whose function it is to construe the act as originally written by reference not only to the words employed but to the history of the act and the interpretation generally placed thereon in the interim.

6. In view of the legislative and judicial history of the Act the Court should affirm, because there is lacking in the statute itself that compelling language which alone would warrant the Court in overturning an interpretation of the Act followed and accepted by Bench and Bar practically ever since its enactment.

a. THERE IS NO COMPELLING LANGUAGE IN THE STATUTE REQUIRING THE OVERTURNING OF THE LONG ESTABLISHED INTERPRETATION.

This case, although distinguishable on other points, as hereinafter set forth, is like *Maynard* v. *Elliott*, 283 U. S. 273, in that the Court is asked to overturn an interpretation of the Bankruptcy Act which has been accepted and followed with substantial unanimity ever since its passage. In declining so to do, in that case, the Court said (pp. 276-277):

> "Within three years after the enactment of the Bankruptcy Act, the Court of Appeals for the Third Circuit, in *Moch* v. *Market Street National Bank, supra*, held that the liability of a bankrupt endorser of commercial paper, which did not mature until after the filing of the petition, was a provable claim under § 63 (a) (4). This ruling was followed by the Court of Appeals for the Second Circuit in *In re Semmer Glass Co., supra*, and

> appears to have been accepted by the Court of Appeals for the Ninth Circuit, *Colman Co.* v. *Withoft, supra,* p. 253, and by the district courts generally. [Citing numerous cases.]
>
> "The rule thus announced seems not to have been seriously challenged until the decision, twenty-six years later, of the Court of Appeals for the Sixth Circuit in *First National Bank* v. *Elliott, supra.* * * * In the meantime, leading text writers have stated that the liability of an endorser, upon a note falling due after the petition, is provable under § 63 (a) (4). 1 Loveland on Bankruptcy (4th ed.) p. 609; 2 Collier on Bankruptcy (13th ed.) pp. 1399-1400; 2 Remington on Bankruptcy (3rd ed.) § 777.
>
> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance. * * *"

Every circumstance present in that case leading to the conclusion stated is present here, including the far reaching consequences of overturning the established practice in respect of the disposition of landlords' claims in bankruptcy. (As to such practical consequences, see pp. 47-51, *post.*) In addition, there are expressions of this Court on the question in dispute not to be found in respect of the question before the Court in *Maynard* v. *Elliott.*

The rule that only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted is neither novel nor new. Courts have repeatedly given weight to the interpretation

placed upon a statute by the courts, administrative branches of the Government and the Bar, when long continued and generally accepted. If such interpretation is clearly wrong, no court is, of course, bound to follow it. But where the question is in any way debatable, orderly administration of justice requires that an interpretation accepted and followed for a long period of time by substantially all courts and concurred in, albeit through dicta, by the court of last resort should not be overthrown. (cases *supra*, pp. 33-34.)

It is not contended by petitioners that the plain wording of the statute itself requires the interpretation placed upon it by them. Any such contention, if made, would be untenable. Claims for future rent are clearly not debts within the ordinary meaning of the word. Whether they are claims or demands, contingent or otherwise, depends upon their legal characteristics; and, if regarded as contingent claims or demands, whether they are provable or not, requires interpretation of the Bankruptcy Act. As the Court was careful to point out in *Maynard* v. *Elliott*, not all contingent claims are provable, even when founded on contract. The question is therefore one which calls for interpretation.

In such circumstances, we know of no better guide by which to determine whether the language of the statute itself is compelling to a certain conclusion than by a consideration of the decisions of the courts which have been called upon to determine the question. In this case, as evidenced by the foregoing review, the lower courts, with substantial unanimity, have held that claims for damages for loss of future rent are not provable in bankruptcy. Many of the very same courts which prior

to *Maynard* v. *Elliot*, held that the liability of a bankrupt-endorser of commercial paper was a provable claim also held that claims for damages for loss of future rent were not provable.* None of these courts saw any inconsistency between the two rules.

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*Cases applying rule that claims for damages for loss of future rent are not provable.

Cases applying or approving rule that claims against bankrupt endorsers on unmatured notes are provable.

FIRST CIRCUIT

Slocum v. *Soliday*, 183 Fed. 410 (C. C. A. 1st, 1910).

In re Ells, 98 Fed. 967 (D. C. Mass., 1900);

In re Shaffer, 124 Fed. 111 (D. C. Mass., 1903);

In re Smith, 146 Fed. 923 (D. C. R. I., 1906);

In re O'Donnell, 131 Fed. 150 (D. C. Mass., 1904);

In re Amdur Shoe Company, 13 Fed. (2d) 147 (D. C. Mass., 1926).

SECOND CIRCUIT

In re Roth & Appel, 181 Fed. 667 (C. C. A. 2d, 1910);

In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 482 (C. C. A. 2d, 1933);

In re Wise Shoes, Inc., 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. 1023.

In re Philip Semmer Glass Co., 135 Fed. 77 (C. C. A. 2d, 1905);

In re Buzzini & Co., Inc., 183 Fed. 827 (D. C. S. D. N. Y., 1910);

In re Rothenberg, 140 Fed. 798 (D. C. S. D. N. Y., 1905).

SIXTH CIRCUIT

In re Pennewell, 119 Fed. 139 (C. C. A. 6th, 1902);

Wells v. *21st Street Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926);

In re McAllister-Mohler Co., 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930).

Germania Savings Bank & Trust Co. v. *Loeb*, 188 Fed. 285 (C. C. A. 6th, 1911);

Courtney v. *Fidelity Trust Co.*, 219 Fed. 57 (C. C. A. 6th, 1914).

NINTH CIRCUIT

Colman Co. v. *Withoft*, 195 Fed. 250 (C. C. A. 9th, 1912).

Colman Co. v. *Withoft*, 195 Fed. 250 (C. C. A. 9th, 1912).

This Court itself, by its decision in *Gardiner* v. *Butler,* 245 U. S. 603, and by its dicta in the other cases cited (I, 3, pp. 24-29, *supra*), has given expression to the view that such claims are not provable in the very cases which petitioners now claim are inconsistent with such conclusion.

In the face of these judicial opinions, it clearly cannot be said that the statute itself contains that compelling language which, as stated in *Maynard* v. *Elliott,* would alone warrant the over-turning of an interpretation of the Act so long accepted and followed by Bench and Bar.

b. As in *Maynard* v. *Elliott,* to overturn the settled practice of more than thirty years would involve serious consequences.

It should be obvious without elaboration that overturning by judicial decision the settled practice of over 30 years would have serious consequences, a circumstance given recognition in *Maynard* v. *Elliott.*

In the meantime, thousands of bankrupt estates have been administered, thousands of bankrupts discharged, the rights of their creditors determined and distribution made in accordance with such settled practice. At the present time hundreds, perhaps thousands, of bankrupt estates are in the course of administration. In some, time for filing proof of claims has expired, in others not. In some, final distribution is imminent, in others compositions effected or agreed upon. In all, save the limited number of individual extensions and compositions affected by the amendment of 1933, these estates have been administered in accordance with the interpretation and practice so long accepted and followed.

Some landlords, like the petitioners, have attempted to make proof of claims for loss of future rent. Others have not. This is true of the United Cigar Stores bankruptcy, one of those involved in the instant cases, in which the time for filing claims has expired. The result of over-turning the present rule, therefore, would be to discriminate as between landlords. On the other hand, if it is proper that the rule be changed—a question upon which there is a difference of opinion—such change should be made by Congress and should be made applicable only to future cases. Only confusion and injustice could result, however, from changing the existing rule by judicial decision.

The foregoing considerations relate to questions of legal machinery and discrimination among landlords. There are more fundamental consequences affecting business engagements, extensions of credit and the rights of creditors past, present and future. As a result of the long accepted rule of law, banks, merchandise creditors and others in granting credit have assumed that, in case of any insolvency, the tangible assets of the borrower would be available for such creditors to the exclusion of landlords asserting claims for loss of future rent. Corporate balance sheets do not show liability for future rent either as a fixed or contingent liability and banks and merchants have advanced funds and merchandise, and manufacturers have sold goods and advanced credit, on the basis of such balance sheets. Doubtless, credit so obtained in many instances has enabled the borrowing enterprise to avoid bankruptcy and survive temporary financial embarrassment. The effect of over-turning the established practice by judicial decision at this late date

would be to dislodge these creditors from their present position, depriving them of a portion of the security upon which they relied and subjecting them to hazards which they did not anticipate in extending credit and which they had a right to assume did not exist.

It is equally obvious that to over-turn the existing practice will require banks, manufacturers, merchants and others extending credit to reconsider and revise all existing lines of credit in the light of the new rule, in many instances to the disadvantage of the borrower. Indeed, such revision may well precipitate bankruptcies which would not otherwise occur.

It would seem that whether such far reaching consequences in respect of both past and future transactions should be brought about by changing existing practice is a matter which should primarily be determined by Congress. Certainly it can be more effectively dealt with legislatively than judicially.*

The effect of a change in the existing practice would vary to the extent that landlords' claims are large or small. Petitioners in their brief lay particular stress upon the hardship falling upon landlords of large chain stores, such as United Cigar Stores Company of America, one of the bankrupts involved in the instant cases. This, of course, is because in the case of such

*Petitioner's brief (p. 33) argues that under the existing practice a corporate tenant with sufficient assets to pay all other classes of creditors may, for the purpose of escaping liability on leases, file a voluntary petition in bankruptcy. The argument assumes that the corporation or its stockholders can through bankruptcy benefit at the expense of those having prior rights. In this connection see *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482; "Landlord Claims in Reorganization" by William O. Douglas and Jerome Frank, 42 Yale Law Journal 1003 (1933).

estates there are numerous long term leases at high rentals. The aggregate of landlords' claims in such cases is very large and represents a high percentage of all claims. While landlords in such cases may suffer, their leases could not have been entered into in any other expectation than that in the event of bankruptcy their claims would not be provable. Other creditors have extended credit to such corporations upon the same hypothesis. As between the two classes of creditors the equities of the latter would seem to be superior.

In considering the practical consequences of a change in the existing rule, it is self-evident that the longer the lease the less likelihood of ultimate loss to the landlord through re-entry and reletting, but at the same time the greater proportion of the bankrupt estate which would be absorbed by him where the bankruptcy occurs during a period of depression. In other words, the longer the term the greater the uncertainty of any loss, but the greater the certainty that the landlord will receive a disproportionately large part of the proceeds of sale. Among all creditors, landlords are the only ones who, to any substantial degree, if at all, receive their property back in the condition in which delivered to the tenant, and at the same time, if the existing rule be changed, will be permitted to share in the distribution of the bankrupt estate, to which, of all creditors, they have contributed nothing. There is no distinction between the legal status of such a landlord whose lease runs 10, 20 or 100 years into the future and one whose lease expires within a single year. If the petitioners prevail, there is little likelihood that the former will suffer any actual loss; yet they will be entitled to recover from the estates amounts 10, 20 or

100 times those recoverable by landlords with short term leases, to the prejudice of the latter, as well as of banks and merchandise creditors who have put real value into the estate and have no chance to recoup their losses other than through participation in the distribution of its assets. This presents a practical problem of real importance which Congress could meet either by limiting the percentage of landlords' claims which might be provable or the period of leases under which such claims might be provable, or providing that the landlord, if he desired to participate in the distribution of the estate's assets, should throw his lease into the pot to be sold along with the other assets of the bankrupt.*

It is thus made apparent that the greatest confusion and much injustice would result from over-turning by judicial decision the well settled practice, which would not and could not have arisen had the practice been different from the start. These consequences are not such as to warrant the Court in affirming, if there is in the statute itself compelling language requiring reversal. These are circumstances, however, which should lead the Court in the absence of such compelling language to follow the long established rule.

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*A distinguished committee under the chairmanship of Mr. Paul H. King, Chairman of the Committee on Uniformity of Practice of the National Association of Referees in Bankruptcy, has suggested certain amendments to the Bankruptcy Act dealing with the provability of future rent claims, which indicate the belief on the part of the committee that such legislation should not simply declare that damages for loss of future rent shall be provable, without more. A copy of the present draft of amendments suggested by such committee in this connection is set forth in the brief herein of Godfrey Goldmark as *amicus curiae* (p. 7).

II

THE LONG ACCEPTED INTERPRETATION OF THE ACT UPON WHICH THE DECISIONS BELOW ARE BASED IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IS SUPPORTED BY WELL ESTABLISHED AND LONG RECOGNIZED PRINCIPLES OF LAW (Answer to Points I, III, IV, V, VI of Petitioners' Brief).

Petitioners argue in Point I of their brief that the grounds for the decision of the leading case in the Second Circuit which was followed by the courts below have been overruled by the decisions of this Court; in their Point IV, that under the principles announced in the decisions of this Court, reviewed in their Point III, claims for damages for loss of future rent are provable in bankruptcy; in their Point V that there is no distinction between such claims and claims founded on breach of executory contracts relating to personalty or to the performance of personal services; and in their Point VI that the same rule is applicable to claims for future rent whether arising from breach of a simple covenant to pay rent or under an indemnity or acceleration clause. Taken together, these several subdivisions of petitioners' brief are parts of but a single argument, to wit: (1) that the generally accepted rule reviewed in Part I of this brief is inconsistent with the decisions of this Court, and (2) that under such decisions, and upon principle, claims for damages for loss of future rent are provable in bankruptcy. This argument, and the several subdivisions of petitioners' brief in which it is presented, will be answered

together, except that Point I will be dealt with in part III of this brief in the discussion with reference to indemnity contracts, to which the case discussed in Point I of petitioners' brief relates.

As indicated in the foregoing summary of petitioners' argument, and as evidenced by petitioners' brief (Point VI), it is the petitioners' contention that there is no distinction between the status of claims arising under an indemnity covenant and claims arising under a simple covenant to pay rent. Petitioners' position is predicated in the first instance upon the broad ground that all claims for damages for loss of future rent are provable in bankruptcy and stand upon the same footing as claims for damages for breaches of covenants and of contracts relating to personalty or to the performance of personal services. In a subsequent subdivision (Part VII), petitioners argue that even if this be not so, claims arising under the particular clauses contained in the leases involved in these cases are so provable. We shall adopt the method of approach pursued by the petitioners, and first discuss the questions presented in the light of their broader aspect as presented by petitioners' brief and thereafter and in the immediately succeeding section of this brief (III, at p. 67 *post.*) address ourselves to the particular provisions of the particular covenants relied on by the petitioners in these cases.

Of the decisions of this Court relied on by the petitioners, none are cases involving the provability in bankruptcy of claims for damages for loss of future rent, whether arising from breach of simple covenants to pay rent or from breach of covenants of indemnity or of

some other description. On the contrary, as already pointed out, this Court, in at least three of the cases relied on by petitioners, has distinguished between claims for damages growing out of the anticipatory breach of contracts relating to personalty or the performance of personal services, and claims for damages for loss of future rent, and by the making of such distinction has clearly indicated—whether such expressions be regarded as dicta or as a part of the decision of the Court—that the latter are not provable in bankruptcy. In its last analysis, the contention of petitioners is that there is no distinction between these two classes of cases, that in expressing the existence of such a distinction this Court was wrong, and that the Court should now hold, despite the accepted interpretation of the Act generally for a period of over 30 years, that there is no distinction and that all claims for damages for loss of future rents, like claims growing out of the anticipatory breach of contracts relating to personalty and to the performance of personal services, are provable in bankruptcy. Unless the petitioners shall sustain this contention, the primary and broad ground upon which they seek a reversal of these cases must fall.

The whole argument of petitioners as contained in the various subdivisions of their brief noted above is summed up under Point VI (p. 40) as follows:

> "The question narrows down to the contention that in the application of the bankruptcy law a distinction must be made between a claim for damages for loss of future rents under a lease of personalty and one for loss of future rents under a lease of realty.

* * * * * * * *

> "With due respect for Lord Coke's quaintly spelled maxim and for the ancient law, we submit that in the application of the Bankruptcy Act such a distinction has no place. It is highly technical. There is no practical difference between the two cases so far as the purposes of the bankruptcy system are concerned. The Act itself makes no exception of contracts for lease of realty and its purposes are defeated if the claim is not provable and, therefore, not discharged, and if the landlord may pursue the bankrupt after discharge. The distinction loses sight of the fact that it is competent for the Congress, notwithstanding the technical law of landlord and tenant, to absolve every bankrupt tenant from his liabilities, and to allow the landlord a provable claim for his loss. As pointed out in Point IX of this brief, England, the place of origin of our law of landlord and tenant, long ago did that very thing."

With regard to the law of England, it is pertinent to observe that it took an act of Parliament to abolish the distinction predicated upon what petitioners concede to be "the technical law of landlord and tenant" and the law governing contracts relating to personalty or to the performance of personal services. That result, which required an act of Parliament in England, petitioners request this Court to achieve by judicial decision contrary to the distinction recognized at common law ever since the days of Lord Coke and to the general acceptance of such distinction not only by the lower Federal courts and the text writers, but by this Court in its previous decisions. Furthermore, the case of *Dunbar* v. *Dunbar*, 190 U. S. 340, constitutes a complete

answer to the contention of the petitioners in Point IX of their brief, that this Court should follow the rule now applicable in England as a result of express provisions in the British Bankruptcy Acts since 1869 permitting the proof of claims for damages for loss of future rent. In *Dunbar* v. *Dunbar,* this Court refused to follow English cases decided under the broad provisions of the British Bankruptcy Acts of 1869 and 1883 expressly allowing proof of all claims, however contingent. (See pp. 14-16, *supra;* petitioners' brief, pp. 47-52.) On the contrary, this Court applied and followed English cases decided under British Acts prior to those of 1869 and 1883. In other words, the only decisions of the English courts which bear on the construction of our Bankruptcy Act of 1898 are those decided prior to the British Bankruptcy Act of 1869, which cases, it is admitted by petitioners (brief, p. 46) refused to allow claims for damages for loss of future rent.

The "technical law of landlord and tenant" referred to in the foregoing excerpt from petitioners' brief, is to be found in the rule that, while breaches of executory contracts relating to personalty and to the performance of personal services give rise to claims for damages, the landlord by re-entry and termination terminates all liability of the tenant to pay rent, and that upon such re-entry and termination no cause of action in favor of the landlord for the recovery of damages for the consequent loss of future rent arises: *Treff* v. *Gulko,* 214 Cal. 591 (1932); *Carson* v. *Arvantes,* 10 Colo. App. 382 (1897); *Cunningham* v. *Stockton,* 81 Kan. 780 (1910); *Lansalot* v. *Mihaljevich,* 12 La. App. 174 (1929); *Sutton* v. *Goodman,* 194 Mass. 389 (1907); *Galbraith* v. *Wood,* 124

Minn. 210 (1914); *Chaude* v. *Shepard,* 122 N. Y. 397 (1890); *Staton* v. *Robinson,* 150 Okla. 234 (1931); *Yuen Suey* v. *Fleshman,* 65 Ore. 606 (1913); *De Long Hook & Eye Co.* v. *Tait,* 108 Pa. St. 369 (1933); *Walling* v. *Christie & Hobby, Inc.,* 54 S. W. (2d) 186 (Tex., 1932); *Crowder* v. *Virginian Bank of Commerce, Inc.,* 127 Va. 299 (1920); 1 Tiffany on Landlord & Tenant, § 182j, p. 1174.

It is this rule of law, covering cases arising out of the relation of landlord and tenant, and the consequent distinction between claims for loss of future rent in such a case and claims for the breach of executory contracts relating to personalty or to the performance of personal services, that this Court recognized and followed in *Gardiner* v. *Butler,* 245 U. S. 603, wherein it specifically referred to Lord Coke's maxim as expressive thereof and to the language of the court in the *Chicago Auditorium* case in further support. When this substantive rule of law and the resulting distinction is borne in mind, the distinction becomes plain between cases involving the provability of such claims on the one hand and those involving the provability of claims arising out of the breach of executory contracts or covenants relating to personalty or to the performance of personal services on the other hand, as recognized and expressed in the decisions both of the lower courts and of this Court.

The distinction is perhaps best illustrated by the *Chicago Auditorium* case, one of the cases relied on by the petitioners. In that case, the Court held that a claim for damages growing out of an anticipatory breach of a contract for the continuing performance of personal

services was provable in bankruptcy. At the same time, the Court distinguished between such a case and a case involving a claim for damages for loss of future rent, basing the distinction upon Lord Coke's maxim which was quoted in the opinion itself. This maxim may be, as stated in petitioners' brief, "quaintly spelled" and expressive of ancient law, but it is likewise expressive of existing law relating to cases growing out of the relation of landlord and tenant (cases, pp. 56-57, *supra*), as recognized by this Court in the *Chicago Auditorium* case and in *Gardiner* v. *Butler, supra.*

The fundamental distinction is that the anticipatory breach of a contract relating to personalty or to the performance of personal services, such as was involved in the *Chicago Auditorium* case, gives rise to an action in damages, whether such anticipatory breach is committed by a person who is wholly solvent or results from the fact that bankruptcy has disenabled the party bound from performing; whereas breach of a covenant to pay rent gives rise to no such cause of action. Breach of a covenant to pay rent, followed by a re-entry and termination by the landlord, would give rise to no cause of action in favor of the landlord were the tenant solvent. Consequently, it gives rise to no claim where the breach of such covenant is the result of bankruptcy. This being so, the claim asserted is not even a contingent claim since all liability of the tenant, whatever the occasion for the default, is extinguished by re-entry and termination of the lease on the part of the landlord.

Counsel for the petitioners asserts that there is no distinction and should be none between a claim for damages for loss of future rents predicated upon the breach

of a simple covenant to pay rent, whether the lease also contains a covenant of indemnity or other covenants having the same purpose. In this counsel for petitioners is at one with the Circuit Courts of Appeals and the District Courts which have recognized the absence of any such distinction and have applied the same rule in both classes of cases. (cases, pp. 20-21, *supra.*)

As heretofore pointed out, it is significant that this Court in the *Chicago Auditorium* case, in directing attention to the distinction between claims for future rent and claims arising out of the breach of executory contracts relating to personalty, cited decisions of the lower Federal courts applying such rule to contracts of indemnity, similar to those in this case, and to claims arising from the breach of other covenants contained in leases as well as to claims asserted to accrue by reason of the breach of a simple covenant to pay rent. (See excerpt from opinion, p. 24, *supra.*) It may not be assumed that the citation of these cases was inadvertent or other than advisedly made. All were stated to be distinguishable from the case presented in the *Chicago Auditorium* case upon the ground that the former were cases arising out of the relation of landlord and tenant and governed by Lord Coke's maxim. The language employed in that case and the reference to these several classes of landlord and tenant cases as distinguishable from the case then under decision would be dismissed by counsel for the petitioners as dictum. As appears from the opinion, the cases cited had been called to the attention of the Court as in conflict with the contention that claims involved in the *Chicago Auditorium* case were provable.

The Court met this contention by pointing out the distinction between the two classes of cases. The determination of the existence or absence of such a distinction would appear to have been necessary to the determination of the case. In any event, whether a part of the decision itself and the determination of a point necessary thereto, or dictum, the Court saw fit to make the distinction, and the dictum, if it be dictum, was expressive of existing law.

Moreover, in the subsequent case of *Gardiner* v. *Butler, supra,* the Court, in addition to referring to Lord Coke's maxim, referred to the *Chicago Auditorium* case in support of its ruling that claims for damages for loss of future rents were not provable in equity.

The distinction may be based upon "the technical law of landlord and tenant",* but substantially all rules of law governing real estate and the rights of parties growing out of title thereto, its use and possession and the rights of persons under instruments relating thereto, are likewise technical.

The foregoing also disposes of the additional cases cited under Point V of petitioners' brief (pp. 34-35), each of which involved a contract relating to personalty or to strictly personal obligations and not to one arising out of the relation of landlord and tenant.

Williams v. *United States Fidelity & Guaranty Co.,* 236 U. S. 549, is distinguishable upon the same ground,

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*This Court's language in the *Chicago Auditorium* case with reference to this distinction has been interpreted as we interpret it in well reasoned opinions in the lower Fedral courts. See *In re Schulte-United, Inc.,* 2 Fed. Supp. 285 (D. C. S. D. N. Y., 1932); *In re McAllister-Mohler Co.,* 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930).

to wit, it did not arise out of the relation of landlord and tenant or of covenants contained in leases creating such relation. This case is further distinguishable, since it appears from the opinion itself that the construction contract, for which the claimant had given a construction bond, had been abandoned by the contractor more than six months before he filed his petition in bankruptcy, that the other party to the building contract had taken possession and completed the structure prior to the bankruptcy of the contractor and had, also prior to bankruptcy, made its demands for payment of the amount expended beyond the contract price. The liability of the surety had therefore become a matured and subsisting liability and demand for its observance had been made prior to bankruptcy. The only thing which remained was the liquidation of the amount due, but all facts, upon which depended the determination of the extent of such liability, were known on the date of bankruptcy for the reason that the structure had been completed. In other words, every event necessary to determine both the fact of liability of the surety, and its amount, had taken place prior to bankruptcy, and appropriate demand therefor had been made. The claim, therefore, was from every point of view a presently existing claim. Whether or not the surety could have maintained an action against the contractor at the date of the latter's bankruptcy, had bankruptcy not intervened, the surety at that date not having made any payment under the construction bond, it is clear that the holder of the bond had a provable claim at the date of bankruptcy which, in fact, was proved by him and allowed, and which, had he not done so, could have been proved by the surety under the express provisions of Section 57(i) of the Bankruptcy Act. Accordingly, the

surety's right over against the principal, being as this Court said "ancillary" to a provable claim which the surety might have proved had the creditor not done so, was discharged.

Maynard v. *Elliott, supra,* is likewise distinguishable upon the ground that it was not a claim arising out of the relation of landlord and tenant or out of covenants relating to the use and occupation of land. It was not a rent case but a note case. The Court had already, in the previous cases hereinbefore referred to, distinguished between rent cases and cases involving purely personal obligations and nothing in the *Maynard* case discloses any departure from the recognition of such distinction. Moreover, that case, as we read it, was based primarily upon the ground that the provability of a bankrupt-endorser's liability upon commercial paper had been the accepted interpretation of the Bankruptcy Act almost ever since its passage. Under these circumstances the Court held that only compelling language in the statute itself would warrant it in overturning an interpretation of the Act so long accepted and followed, and upon an examination of the statute found no such compelling language therein. Future rent claims during the same period have, with the same substantial unanimity, been held *not* to be provable.

Maynard v. *Elliott* was not a case the purpose and effect of which was to revolutionize either the principles governing the interpretation of the Bankruptcy Act or the practices thereunder. It was a very simple case based upon the familiar rule that an interpretation so long accepted and followed generally should not be overturned in the absence of such compelling language. In its refer-

ences to the statute and to the decisions thereunder in the subsequent part of the opinion, the Court, it is true, held that a claim is not to be disallowed merely because contingent upon date of bankruptcy, but was then careful to point out that not all contingent claims were so provable, citing as an illustration of this cautionary expression *Atkins* v. *Wilcox,* 105 Fed. 595, which was a future rent case. Seemingly, the Court went out of its way to make it plain that, in sustaining the previously accepted interpretation of claims arising through the endorsement of commercial paper, it did not mean to overturn the equally long established interpretation placed upon the Act in respect of claims for future rent. In addition, as we have seen, a claim for damages for future rent is not, under the established rules of law concerning cases arising out of the relation of landlord and tenant, even a contingent claim, since default upon the part of a solvent tenant gives rise to no right to the recovery of damages. The very same courts found nothing inconsistent between the rule affirmed in *Maynard* v. *Elliott* and the rule rejecting claims for future rent. (Footnote p. 46, *supra.*)

Kothe v. *R. C. Taylor Trust,* 280 U. S. 224, does not help the petitioners. In that case, the Court disallowed a claim based upon a covenant, in the event of automatic termination upon bankruptcy, to pay damages equal to the amount of rent reserved for the residue of the term. In so doing, the Court treated this covenant as creating a penalty and requiring the payment of sums having no reasonable relation to any probable damage resulting from the breach. The argument of the petitioners is that the Court, by so holding, excluded by inference the existence of ground for rejecting the claim

under the generally accepted rule. But it was not necessary for the Court to give expression to every ground upon which the claim might be rejected. In the light of this Court's views as expressed in the cases referred to above (I, 3, pp. 24-29, *supra*) it is difficult to see how this Court's opinion in the *Kothe* case can be taken to indicate that the claim would have been allowed if the obligation had been different or had more nearly corresponded to the payment of actual damages. Certainly there is nothing in the opinion to indicate that a claim based upon particular covenants such as in these cases would be provable in bankruptcy when it would not have given rise to any present liability had the tenant remained solvent.

William Filene's Sons Co. v. *Weed,* 245 U. S. 597, is the only case cited in which a claim for damages for loss of future rent was allowed. This was an equity case and not a bankruptcy case. In the dictum hereinbefore quoted (pp. 26-27, *supra*), the Court clearly intimated that the claim would not have been allowable in bankruptcy. Otherwise there was no occasion for the dictum. It was inserted, without doubt, for the purpose of removing the contention which might otherwise have been made that the Court intended by that case to overturn the long accepted interpretation of the Bankruptcy Act concerning such claims. The Court pointed out that where a court is administering a statutory system it must administer it according to the statute, but that the lower court was wrong in assuming that the rule applicable under the statutory proceedings in bankruptcy was likewise applicable in equity. Having so stated, the Court said that when a court without a statute takes possession of all the assets of a corpo-

ration and makes it impossible to collect debts except through the court, there is no warrant for excluding creditors or introducing equities other than those determined by the contracts the debtor made. In other words, the Court merely held that, where the case was one arising under the general equity jurisdicition of a court, it was free to provide for such distribution of the assets as were consistent with both the powers and obligations assumed by the court in such a proceeding.

Moreover, this case must be read in the light of the immediately succeeding case of *Gardiner* v. *Butler, supra,* in which the Court expressly disallowed, even in an equity proceeding, a claim for damages for loss of future rent growing out of the breach of a simple covenant to pay rent as distinguished from a covenant to pay an amount to be determined as liquidated damages in a stipulated manner as in the *Filene* case. These cases read together completely dispose of the petitioners' primary argument that all claims for damages for loss of rent are provable in bankruptcy whether arising from breach of a simple covenant to pay rent, under covenants for payment of liquidated damages as in the *Filene* case or under contracts of indemnity, as in these cases. When the dictum in the *Filene* case is given that effect which it was obviously intended to have, we think the *Filene* case also disposes of any contention that while a claim for damages for future rent by reason of a breach of the simple covenant to pay rent would not be provable in bankruptcy under the reasoning of *Gardiner* v. *Butler,* a claim based upon such a provision as was found in the *Filene* case would be so provable. Otherwise there was no occasion for the court to distinguish between the rule in bankruptcy and the rule in equity.

Assuming, however, for the sake of argument that such is the effect of the *Filene* case, the obligation therein undertaken by the tenant was entirely different from the obligation undertaken by the tenants in the instant cases, as we shall point out in the next succeeding subdivision of this brief dealing with the status of claims arising under the particular clauses to be found in the leases now before the Court.

As hereinbefore stated, and as evidenced throughout their brief, the petitioners' major and fundamental contention is that claims for damages for loss of future rent are in no way distinguishable from claims for damages growing out of executory contracts relating to personalty and to the performance of personal services, and that no distinction *should be made* in respect thereof in the administration of the Bankruptcy Act. As demonstrated above, this contention cannot be sustained. It cannot be sustained because fundamentally claims for damages for loss of future rent are not recoverable against a solvent defaulting tenant, while claims for damages growing out of breaches of executory contracts relating to personalty and to the performance of personal services give rise to an immediate cause of action against the party at fault, if solvent.

The necessary result is that claims of the latter class are generally provable in bankruptcy, the exceptions thereto being exceptions to the general rule, and that, conversely, claims for damages for loss of future rent are not provable in bankruptcy, the exceptions, if any, being exceptions to the general rule.

These cases constitute no such exception.

III

THE SPECIFIC CLAIMS PRESENTED IN THESE CASES, ARISING OUT OF THE PARTICULAR COVENANTS CONTAINED IN THE LEASES BEFORE THE COURT, ARE IN NO EVENT PROVABLE IN BANKRUPTCY.

1. In the *Brown* Case, No. 506.

The covenant relied on in support of this claim is:

> "Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, *and upon entry as aforesaid this lease sh 'l determine, and the Lessee*

> *covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified"* (R. 7). [Italics ours.]

The covenant relied on was not a covenant for the payment of liquidated damages. Neither was it one giving rise to any liability or right of action whatsoever at the date of re-entry and termination. It was a covenant to indemnify against actual loss only. The loss against which the tenant agreed to indemnify the landlord was, in the words of the instrument itself,

> "all loss of rent which the lessor *may incur* by reason of such termination, *during the residue of the term*".

The words employed thus plainly limited the obligation of the tenant in the event of default, re-entry and termination to the payment only of such loss of rent as the landlord might suffer during the remainder of the term, until the conclusion of which it could not be determined whether there was a loss or, if so, its amount. It imposed no present liability and its provisions could not be breached unless at the end of the term it developed that there was an actual loss and the tenant refused to make good his covenant. Until the happening of these events, no liability whatsoever attached and no cause of action could arise.

It is well settled that, under a contract of indemnity against loss, no liability arises unless and until loss has actually been suffered by the indemnitee, that no cause of action arises until such actual loss has been suffered and

that hence no liability attaches and no action may be brought until after the expiration of the period necessary in respect of each particular case for the determination of the existence or absence of such loss. *Wicker* v. *Hoppock*, 6 Wall. 94; *Southern Surety Co.* v. *Sheldon*, 33 Fed. (2d) 289 (C. C. A. 9th); *O'Connor* v. *Aetna Life Insurance Co.*, 67 Neb. 122; *Trinity Church* v. *Higgins*, 48 N. Y. 532; *Henderson-Achert Lithographic Co.* v. *John Shillito Co.*, 64 Ohio St. 255; *Central Trust Co.* v. *Louisville Trust Co.*, 100 Fed. 545 (C. C. A. 6th).

The rule was thus stated by this Court in *Wicker* v. *Hoppock*, *supra*:

> "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

The general rule stated above is equally applicable to contracts of indemnity for loss of rent. It was so held in *Hermitage Co.* v. *Levine*, 248 N. Y. 333, in an opinion by Mr. Justice Cardozo, then Chief Judge of the Court of Appeals New York. As the Court said in that case (p. 338):

> "* * * it may turn out in the end that there has been a gain and not a loss".

To the same effect are *Gardiner* v. *Parsons*, 224 Mass. 347; *Providence Bldg. Co.* v. *Atlantic National Bank et al.*, 228 Fed. 814 (D. C. R. I.); *Phillips-Hollman* v. *Peerless Stages, Inc.*, 210 Cal. 253.

Had the tenant in this case remained solvent and the lease been terminated for its default, it would have incurred no liability whatever at the date of the termination and re-entry or until the end of the term and then only if it appeared at that time that the landlord had suffered an actual loss. It follows of necessity that the covenant relied on gave rise to no liability upon the part of the Bankrupt by reason of re-entry and termination and hence to no claim subsisting at the date of bankruptcy even if such re-entry and termination be related back to such date.

Prior to the enactment of the Act of 1898, it had been held that a claim under a similar contract of indemnity was not provable in bankruptcy under the Act of 1867, although that Act permitted proof of contingent claims. *Ex parte Lake*, Fed. Cas. 7991 (1877). The first case which arose after the Act of 1898 involving such an indemnity covenant in a lease was the case of *In re Ells*, 98 Fed. 967 (D. C. Mass. 1900). In that case the Court said (p. 969):

> "What, then, would be the remedy of the landlord against the former tenant immediately after re-entry under the clause mentioned, had there been no bankruptcy of the tenant? Could the landlord have recovered at once the difference between the present letting value and the rent for the residue of the original term? I think not. The contract was one of indemnity for loss of rent and other payments, and would be broken

only after, and so far as, rent had been lost and payments had been made. Doubtless, the covenant might have been expressed otherwise. If the debtor in this case had made a contract to take a lease at a fixed rent, and had broken the contract by refusing to execute the lease, damages for the entire breach could have been recovered at once, and might perhaps have been estimated at the difference between the rent stipulated in the contract and the rental value of the premises. A covenant in a lease might be worded expressly to require the lessee, in case of re-entry, to pay at once damages calculated upon this basis. But the contract or covenant supposed is not the covenant in this case. The contracts sued upon in the cases cited in argument by counsel for the creditor—contracts to take water for a specified time, to employ the plaintiff, to furnish board or support, etc.—were not contracts of indemnity. Immediately after re-entry the lessor in this case, even if unhampered by bankruptcy, could not have brought suit on this covenant against the lessee to recover the damages for which he seeks to prove against the lessee's estate in bankruptcy."

To the same effect are *In re Roth & Appel,* 181 Fed. 667 (C. C. A. 2d, 1910); *In re Wise Shoes, Inc.,* 2 Fed. Supp. 521 (D. C. S. D. N. Y., 1932), aff'd 64 Fed. (2d) 1023; *In re Hubbard,* 57 Fed. (2d) 213 (D. C. W. D. N. Y., 1932); and *In re Bliss Auto Sales Co.,* 22 A. B. R. (N. S.) 44 (D. C. N. D. Ohio, 1932).

Another case in which the ground for decision was that the claimant could not have recovered at the date of the adjudication against a solvent indemnitor is *In re Merrill & Baker,* 186 Fed. 312 (C. C. A. 2d). In

that case the claimant had loaned money to a subsidiary corporation of the bankrupt upon collateral security. The bankrupt had guaranteed that in case the proceeds of the pledged collateral should be insufficient to pay the loan it would pay the amount of the deficiency. At the date of the bankruptcy of the parent corporation, the loan was unpaid and the collateral was still intact in the hands of the claimant. The District Court held that the contract was not one to pay the amount borrowed at all events but only to pay if and to the extent that the security for the loan was insufficient and that an action could not have been maintained against the bankrupt on the day of bankruptcy, saying (p. 315):

> "There was no certainty that anything ever would be due nor certainty as to what would be due if liability ever arose."

On appeal the Circuit Court of Appeals affirmed, on the decision of the District Judge.

As heretofore pointed out, the cases of *In re Ells* and *In re Roth & Appel* were both cited by this Court in the *Chicago Auditorium* case. The case of *In re Merrill & Baker* was cited in this Court's opinion in *Maynard* v. *Elliott* as exemplifying a claim which was not provable in bankruptcy.

In Point I of their brief, petitioners argue that the grounds of the decision in *In re Roth & Appel, supra* (the leading case in the Second Circuit which the court below followed in these cases) have been overruled by subsequent decisions of this Court. With this we disagree. It is true that in that case the court expressed the view that, reading the provisions of sub-division 1

into sub-division 4 of section 63, a debt to be provable must be absolutely owing at the date of the bankruptcy. While it may have been influenced by this view, its decision was not predicated thereon and, the court stated that this expression of its view was unnecessary for the decision. It is apparent that the court was following the decision of *In re Ells, supra,* to which it referred and from which it quoted. The court stated (p. 672):

> "In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equalled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

But if every reason advanced by the court in *In re Roth & Appel* for its decision were erroneous, the decision would still be correct, for, in that case, just as in the cases of *In re Ells* and *In re Merrill & Baker* and just as in the instant cases, the claimant would have had no claim on his indemnity covenant at the date of bankruptcy had his indemnitor remained solvent.*

Counsel for petitioners (brief, p. 42) erroneously treat the covenant of indemnity in these cases as the equivalent of the liquidated damage clause under which damages were allowed to be proved in equity in *William*

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*It should be noted that this rule has been applied to prevent the proof of a claim for damages for loss of future rent in an equity case. See the well reasoned opinion of Circuit Judge Mack in *Western Electric Co., Inc.* v. *Powers Accounting Machine Co.* (referred to in Referee's opinion in Case No. 506, R. 25-26). Judge Mack's opinion is quoted at length in the brief herein of Arthur A. Ballantine as *amicus curiae* (pp. 13-14).

Filene's Sons Co. v. *Weed, supra.* The distinction is, of course, plain. A contract to indemnify against actual loss gives rise to no liability, except in the event of such loss, and to no cause of action until the existence of an actual loss has been ascertained. A contract to pay liquidated damages is a contract to pay a fixed sum, or an amount to be ascertained under some formula provided by the parties in the contract, immediately upon the breach of some covenant contained in the contract. A contract of indemnity is in no way the legal equivalent of a contract for the payment of liquidated damages. To allow the present claims would be to apply to contracts of indemnity in leases a rule completely at variance with contracts of indemnity in other cases.

Moreover, the factual situation upon which the amount of the recovery in the two cases depends is wholly different. The agreement in the *Filene* case was to pay the difference between two presently ascertainable sums, *i.e.* the reserved rent and the estimated rental value of the premises for the remainder of the term *at the date of re-entry and termination.* The agreement under a contract of indemnity is to pay the actual loss suffered during the residue of the term, the existence or amount of which is not a presently ascertainable fact. Opinion evidence as to the present rental value of the premises for the remainder of the term at the date of re-entry and termination is obviously admissible under an agreement such as that made in the *Filene* case, and such opinion evidence will be based upon the then existing state of the rental market. Even if opinion evidence on which to base an estimate of the rent which the landlord will

receive in future years were admissible, it remains true that any such estimate is purely a matter of speculation and conjecture, and does not and cannot determine *the actual loss which the landlord may suffer during the residue of the term, to pay which is the only liability of the tenant under its indemnity covenant.*

This distinction is well illustrated by the case of *Gardiner* v. *Parsons, supra,* in which an assignment for creditors had been made by a tenant under a lease providing:

> "and the Lessee covenants that in case of such termination * * * it will indemnify the Lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time * * * specified for the duration of the said term; or at the election of the Lessor the Lessee will upon such termination pay to the Lessor as damages such a sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named. * * *"

The Court said (p. 350):

> "The plaintiff however could not recover both indemnity and damages, but must elect the ground of liability on which he proposed to hold the lessee. * * * If indemnity is chosen, the lessee becomes liable for any loss resulting from a rental less than the rent reserved with other payments which the lessor may incur 'by reason of such termination during the residue' of the term. It is a liability contingent upon events thereafter occurring, because the full amount which the lessee

> eventually must pay for the remainder of the term cannot be wholly ascertained until the period ends. * * *
>
> If, however, the lessor elects to take damages, they are assessed as of the date of termination, and are measured by the difference between the rental value of the premises in the market for the remainder of the term 'and the rent and other payments herein named'."

It is said in petitioners' brief that the covenant of indemnity, like the covenant broken in the *Chicago Auditorium* case, was a personal covenant and as in that case affords a basis for a provable claim in bankruptcy. As we have already pointed out, the Court in that very case distinguished between covenants relating to personalty and to the performance of personal services and those growing out of the relation of landlord and tenant. There is, however, this further insurmountable distinction. The breach relied on in the *Chicago Auditorium* case had already occurred, giving rise, under the doctrine of anticipatory breach of contracts relating to personalty and to the performance of personal services, to an immediate right of action in damages. No breach of the covenant of indemnity had occurred or could occur until the end of the term, before which time no liability whatever attached and no cause of action arose, and then only in the event of actual loss. The doctrine of anticipatory breach is wholly inapplicable to a contract of indemnity as distinguished from a contract for continuing performance in respect of personalty or personal services, such as for the delivery of goods or performance of personal services over a period of time. *Roehm* v. *Horst,* 178 U. S.

1, 17, 18; *Moore* v. *Security Trust & Life Insurance Co.*, 168 Fed. 496 (C. C. A. 8th), cert. denied 219 U. S. 583. A contract of indemnity can be breached, if at all, but once and then only at the time when the indemnitor refuses to make the indemnitee good as against an actual loss.

2. In the *Manhattan Properties* Case, No. 505.

In the *Manhattan Properties* case, the tenant agreed, in the event of re-entry and re-letting by the landlord,

> "* * * to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; * * *"

and it was further provided,

> "* * * the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

As in the *Brown* case, there was no covenant for the payment of liquidated damages or of damages to be

ascertained in any manner at the date of re-entry. The obligation of the tenant was only to pay, as stated above, such deficit, if any, as should accrue from month to month during the residue of the term and only if and to the extent that there should be such a deficit would the tenant be under any liability.

It is therefore clear that, at the date of the petition, the landlord in the *Manhattan Properties* case would have had no cause of action against the tenant had bankruptcy not intervened, except for the current month's rent which has been allowed. *McCready* v. *Lindenborn*, 172 N. Y. 400; *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28.

The lease moreover contemplated that if the landlord should actually receive during the residue of the term an aggregate amount exceeding the reserved rent, the amount of the excess should be paid to the tenant at the end of the term. In other words, while providing for a possible liability on the part of the tenant in the event of actual loss by the landlord, it also provided for a possible liability upon the part of the landlord in the event of actual gain, a liability which the landlord could extinguish only by release of the tenant by notice in writing within the six months period provided for. The periodic payments to be made by the tenant in the event of loss from month to month therefore constituted interim payments only to be taken into account at the end of the term in determining the ultimate liability of either party which would be in no wise affected thereby.

If at the end of the term there should be an overplus in excess of the reserved rent, the mutual covenants contained in the lease would give rise to the creation of an asset rather than of a liability. If it is now competent

for the Court under the provisions of this lease to undertake to determine whether at the end of the term there will be a loss and, if so, how much, and to allow the same as a claim against the bankrupt estate, it is equally competent for the Court and equally its duty to determine by the same process of conjecture that there will be an ultimate gain and to permit a recovery against the landlord of the amount of such gain as a part of the assets of the estate. Either determination would equally involve conjecture and speculation. Neither is permissible either under the Bankruptcy Act or at common law. Just as under the ordinary contract of indemnity re-entry and termination would give rise to no present liability or cause of action against a defaulting solvent tenant so, under the peculiar provisions of this lease, no present cause of action in favor of the tenant and against the landlord under the overplus provision would arise and the existence or amount of his possible liability thereunder would not be ascertainable until the end of the term. Clearly the liabilities of either landlord or tenant under the covenant relied on and their present enforcement rest on the same foundation. Clearly neither is a presently existing or presently ascertainable liability and neither may be asserted or adjudicated in the bankruptcy proceedings.

3. Even though a claim for damages under breach of a simple covenant to pay rent should be held to be provable, claims arising under the leases here in question are not provable.

Petitioners invite this Court to overrule its decision in the case of *Gardiner* v. *Butler*, 245 U. S. 693. For the

reasons hereinbefore stated, we think it plain that that decision was correct and that a claim for damages for breach of a simple covenant to pay rent is not provable because re-entry and termination terminated all obligation of the tenant to pay without giving rise to any cause of action, even as against a solvent tenant, for damages for breach of such covenant.

Even if this Court should otherwise determine, however, the claims presented in these cases are not provable in bankruptcy. The parties in these cases by contract themselves provided the remedy for breach. By so providing, the landlord waived any claim which might have otherwise arisen through a breach of the covenant to pay rent itself and limited his right of recovery to actual loss sustained, if any. In neither lease is provision made for concurrently alternative remedies. The parties themselves fixed their respective rights and liabilities by contract and, for the reasons given above, no provable claim may arise under the covenants adopted by the parties as measuring their respective rights in the event of default.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENTS OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

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